A

TAN SRI DR M MAHADEVAN v. DR JEYALAKSHMI RATNAVALE & ORS

COURT OF APPEAL, PUTRAJAYA
DAVID WONG DAK WAH JCA
UMI KALTHUM ABDUL MAJID JCA
B HASNAH MOHAMMED HASHIM JCA
[CIVIL APPEAL NO: K-02(NCVC)(A)-697-04-2015]
19 OCTOBER 2016

C ***SUCCESSION:*** *Will – Administration of estate – Whether beneficiaries who had survived testator but subsequently died remained as beneficiaries – Intention of testator – Whether court to read will without regard to consequences of any rule of law or canon of construction – Whether there was intention of disenfranchisement upon death of any beneficiary – Whether court could infer disenfranchisement*

D The genesis of this suit was the will created by Ratnavale, wherein, two of his brothers, the appellant and the second defendant, were appointed as the executors and trustees. Ratnavale passed away on 9 April 1973 and on the date of his death, the eight beneficiaries mentioned in the will were alive. The trustees of the Ratnavale's will had not exercised their discretion in respect of the distribution of the properties of the Ratnavale estate as E provided for in the will and two of the beneficiaries, *ie*, the testator's wife, Annalakshmi, and mother, Ratnamal, had since passed away. The remaining beneficiaries were the six children of Ratnavale, the respondents in this appeal. The respondents applied to the court to terminate the trust created under Ratnavale's will and prayed for all the properties of the Ratnavale's F estate be distributed equally to the respondents as the surviving beneficiaries to the trust. The High Court ruled, *inter alia*, that Ratnavale's will be terminated and that the two properties be transferred to the respondents. Hence, the appeal by the appellant and the issue for determination, in essence, was whether the named beneficiaries in Ratnavale's will who had G survived the testator but subsequently died remained as beneficiaries and were entitled to the distribution of the Ratnavale's estate.

Held (allowing appeal with no order as to costs; setting aside High Court orders)
Per David Wong Dak Wah JCA delivering the judgment of the court:

H **(1)** A beneficiary under a discretionary trust had no immediate right to the trust property. The only right of a beneficiary of a discretionary trust is to require the trustees to consider from time to time whether or not to apply the whole or some part of the income for his benefit. (para 20)

I **(2)** The court, in the context of this case, was only required to determine what the intentions of the testator in Ratnavale's will were and the only way to execute that task was to look first at the will and read it without

regard to the consequences of any rule of law or canon of construction. The words used in the will must be given the meaning which was rendered necessary by the context of the whole will in that a particular passage must be read together with whatever was relevant in the rest of the will to explain it. (para 23)

(3) The testator gave all his property, moveable or immovable, to his wife, his mother and his six children but in such proportion as his trustees at their discretion deem fit. The will had created a discretionary trust but that does not *ipso facto* or automatically infer an intention of disenfranchisement upon the death of any of the beneficiary. There was no such intention of disenfranchisement herein for the simple reason that there were no such specific provisions or words used by the testator in Ratnavale's will. The courts could not infer such an intention as any attempt to do so would amount to a re-writing of the will. Hence, the representatives of the estate of the wife and mother of Ratnavale were entitled to demand their 'equitable chose of action' to be remitted to their estate so that they could compel the executors to carry out the terms of the trust (paras 24, 25 & 26)

(4) Every beneficiary in a discretionary trust has the legal right to challenge the decisions of the trustees if that decision was arrived at in bad faith or illegal even though the testator had given the trustees a full discretion to determine the proportion to be given to the beneficiaries. Such a legal right can only be taken away by clear words. However, there was no intention to disenfranchise the deceased beneficiaries in the mother and the wife from the estate. (para 27)

Bahasa Malaysia *Headnotes*

Genesis dalam guaman ini adalah wasiat yang dibuat oleh Ratnavale, di mana, dua daripada adik lelakinya, perayu dan defendan kedua, dilantik sebagai wasi dan pemegang-pemegang amanah. Ratnavale meninggal dunia pada 9 April 1973 dan pada tarikh itu, lapan orang benefisiari yang dinyatakan dalam wasiatnya masih hidup. Pemegang-pemegang amanah wasiat Ratnavale tidak melaksanakan budi bicara mereka berkaitan pengagihan harta pusaka Ratnavale seperti yang diperuntukkan dalam wasiat dan dua daripada benefisiari, iaitu, isteri pewasiat, Annalakshmi, dan ibu, Ratnamal, telah meninggal dunia. Baki benefisiari ialah enam orang anak Ratnavale, responden-responden dalam rayuan ini. Responden-responden memohon daripada mahkamah untuk membatalkan amanah yang dibentuk dalam wasiat Ratnavale dan memohon agar kesemua harta pusaka Ratnavale diagihkan sama rata antara responden-responden sebagai benefisiari-benefisiari yang masih hidup. Mahkamah Tinggi memutuskan, antara lain, wasiat Ratnavale ditamatkan dan dua hartanah dipindah milik kepada responden-responden. Dengan itu, rayuan ini oleh perayu dan isu untuk

penentuan, secara inti patinya, adalah sama ada benefisiari-benefisiari yang dinamakan dalam wasiat Ratnavale yang masih hidup semasa pewasiat meninggal dunia tetapi kemudian meninggal dunia masih kekal benefisiari-benefisiari dan berhak ke atas pengagihan harta pusaka Ratnavale.

Diputuskan (membenarkan rayuan tanpa perintah untuk kos; mengetepikan perintah-perintah Mahkamah Tinggi)
Oleh David Wong Dak Wah HMR menyampaikan penghakiman mahkamah:

(1) Benefisiari bawah amanah budi bicara tidak berhak terus pada harta amanah. Satu-satunya hak benefisiari amanah budi bicara adalah dengan meminta pemegang-pemegang amanah untuk mempertimbangkan dari masa ke masa sama ada hendak menggunakan kesemua atau sebahagian hasil daripada faedahnya.

(2) Mahkamah, dalam konteks kes ini, hanya diminta menentukan apakah niat pewasiat dalam wasiat Ratnavale dan satu-satunya cara melaksanakan tugas tersebut adalah dengan meneliti wasiat itu terdahulu dan membacanya tanpa mempertimbangkan akibat apa-apa kaedah undang-undang atau hukum pentafsiran. Perkataan-perkataan yang digunakan dalam wasiat mesti diberi maksud yang diperlukan dalam konteks wasiat keseluruhannya di mana perenggan tertentu mesti dibaca bersama-sama dengan apa-apa yang relevan dalam wasiat untuk menjelaskannya.

(3) Pewasiat mewasiatkan kesemua hartanya, yang boleh alih dan tidak boleh alih, kepada isterinya, ibunya dan keenam-enam anaknya tetapi dalam bahagian yang difikirkan sesuai dalam budi bicara pemegang-pemegang amanah. Wasiat tersebut membentuk wasiat budi bicara tetapi ini tidak secara automatik memberikan kesimpulan niat melucutkan hak atas kematian mana-mana benefisiari. Tiada niat melucutkan hak sedemikian di sini semata-mata kerana tiada peruntukan khusus atau perkataan-perkataan yang digunakan oleh pewasiat dalam wasiat Ratnavale. Mahkamah tidak boleh menyimpulkan niat sedemikian kerana apa-apa cubaan untuk berbuat demikian bermaksud menulis semula wasiat. Oleh itu wakil-wakil harta pusaka isteri dan ibu Ratnavale berhak menuntut 'equitable chose of action' mereka dikembalikan kepada harta pusaka mereka supaya mereka boleh memaksa wasi-wasi melaksanakan terma-terma amanah.

(4) Setiap benefisiari dalam amanah budi bicara mempunyai hak sah untuk mencabar keputusan pemegang-pemegang amanah jika keputusan dibuat dengan niat jahat atau tidak sah walaupun pewasiat memberikan pemegang-pemegang amanah budi bicara penuh untuk menentukan bahagian yang perlu diberi kepada benefisiari-benefisiari. Hak sah

tersebut hanya boleh dinafikan dengan perkataan-perkataan yang jelas. Walau bagaimanapun, tiada niat untuk melucutkan hak benefisiari-benefisiari yang meninggal dunia iaitu, ibu dan isteri pewasiat daripada harta pusaka.

Case(s) referred to:
Chief Commissioner of Stamp Duties v. Buckle [1998] 151 ALR 1 ***(refd)***
Gartside & Anor v. Inland Revenue Commissioners [1968] AC 553 ***(refd)***
Panchanath Ratnavale v. Sandra Segara Mahalingam & Ors [2012] 1 LNS 167 HC ***(refd)***
Re Gulbenkian's Settlement Trusts (No. 2) [1970] Ch 408 ***(refd)***
Sudeley v Attorney [1897] AC 11 ***(foll)***

Legislation referred to:
Finance Act 1894 [UK], ss. 2(1)(b), 7(7)
Finance Act 1940 [UK], ss. 2(1)(b), 7(7), 43

For the appellant - WS Davidson, Gopal Sri Ram, Sheela Das & David Yi; M/s Azman Davidson & Co
For the respondent - Mura Raju & K Govindaraju; M/s G Raju & Co

[Editor's note: For the High Court judgment, please see Dr Jeyalakshmi Ratnavale & Ors v. Tan Sri Dr M Mahadevan & Ors [2015] 7 CLJ 608 (overruled).]

Reported by S Barathi

JUDGMENT

David Wong Dak Wah JCA:

Introduction

[1] This is an appeal against a decision of the Alor Setar High Court in which the learned judge had ruled that:

(a) the trusts constituted by the will of one Ratnavale s/o Mahalingam (Ratnavale) dated 10 February 1971 be terminated;

(b) the two properties, namely GM 845, Lot 290 and GM 621, Lot 461, Mukim Kulim, be transferred to the six surviving beneficiaries (the respondents) of the will;

(c) the sum of RM2,948,070.62 deposited in the Alor Setar High Court together with interests be transferred to the respondents' solicitors; and

(d) the attempt by the appellant to include the properties in Penang, namely Lots 743, 744, 745 and 747, Section 3, Daerah Timur Laut, Pulau Pinang was rejected premised on the principle of *res judicata*.

[2] After hearing submissions from respective counsel on 14 April 2016, we reserved our decision for deliberation of the same. We have since deliberated and now give our decision and grounds.

A **Background Facts**

[3] The genesis of this suit is the will created by Ratnavale and the subject of this litigation is para. 3 of the will which reads as follows:

> I hereby give, bequeath and devise all my movable and immovable property of whatsoever nature or description and wheresoever situate subject to the payment of my debt, funeral, testament and administration expenses unto my legally married wife ANNALAKSHMI, my mother Madam RATNAMMAL and all my six (6) children in whatever proportion my said trustees at their discretion shall choose (*sic*) to distribute.

[4] Ratnavale had in his will appointed two of his brothers in the person of the appellant and the second defendant as the executors and trustees of the will. Ratnavale passed away on 9 April 1973 and on that date of death, the eight beneficiaries mentioned in the will were alive.

[5] As of now, the trustees of the Ratnavale's will have not exercised their discretion in respect of the distribution of the properties of the Ratnavale estate as provided for in the will and two of the beneficiaries in the person of testator's wife, Annalakshmi and mother, Ratnamal, had since passed away. The remaining beneficiaries are the six children of Ratnavale, who are the respondents in this appeal.

[6] Probate of the will was granted on 9 May 1974.

[7] Ratnamal passed away on 29 December 1994 leaving a will dated 29 September 1992 where her two daughters were appointed joint executors and also equal beneficiaries to her estate. Letters of administration with will annexed was granted by the Ipoh High Court to the appellant as attorney for the two daughters.

[8] Annalakshmi passed away on 26 October 2010 and no grant of probate or letters of administration has ever been issued by any court.

[9] In this suit, the respondents applied to the court to terminate the trust created under the Ratnavale's will and prayed for all the properties of the Ratnavale's estate be distributed equally to the respondents as the surviving beneficiaries to the trust.

Issues

[10] Having heard respective counsel's submissions in the context of the factual matrix, we are of the considered view that there are in essence two determinative issues before us and they are these:

(a) Whether the appellant was entitled to include the Penang properties (Lots 743, 744, 745 and 747, Section 3, Daerah Timur Laut, Pulau Pinang) as part of the Ratnavale's estate?

(b) Whether the named beneficiaries in the Ratnavale's will who had survived the testator but subsequently died remained as beneficiaries and entitled to the distribution of the Ratnavale's estate?

Issue 1: Penang Properties

[11] The learned judge rejected the appellant's attempt to include the Penang properties in the Ratnavale's estate premised on the ground that the status of the aforesaid properties had been adjudicated right up to the Federal Court in the first Penang proceedings in suit 22458-2000, hence the principle of *res judicata* was applied with full force. Before us, the appellant submitted that the application of the principle of *res judicata* was wrongly applied.

[12] Fortunately, we are not called upon to adjudicate on the issue as we were able to obtain a concession from counsel for the respondent that the Penang properties are part of the Ratnavale's estate. Counsel for the appellant accepted the concession and with that no further argument was heard by the court. With that we move to the next and crucial issue.

Issue 2: Rights Of Named Beneficiaries Who Had Survived The Testator And Subsequently Died

[13] To recapitulate, the relevant named beneficiaries who had survived the testator and died subsequently are Madam Ratnamal and Madam Annalakshmi (deceased beneficiaries).

[14] In determining this issue, the learned judge first held that the trust created in the Ratnavale's will is one of a discretionary trust premised on what the learned Judicial Commissioner in a related case of *Panchanath Ratnavale v. Sandra Segara Mahalingam & Ors* [2012] 1 LNS 167 held in respect of the Ratnavale's will:

> I think it is also important to recall that D1 and D2 were operating what is termed as a discretionary trust. This was because D1 and D2 as Executors and Trustees were given the power and discretion to distribute the assets of Ratnavale after payment of debts and expenses "in whatever proportion my said trustees at their discretion shall choose to distribute". In the *Law of Trust* by JG Riddall, 6th Edition, discretionary trust is defined as follows (at 283):
>
> > A discretionary trust is one under which discretion is conferred by the settlor on the trustees to decide which member or members of a class of beneficiaries should be entitled to the trust property ...
> >
> > The terms of a discretionary trust may give trustees discretion not only as to which beneficiary or beneficiaries should take, but also as to whether to make any distribution of trust property (capital or income as the case may be) at all ...
> >
> > A beneficiary who receives nothing under the trust has no grounds for attacking the trustees' exercise of their discretion unless he can show that the trustees have acted capriciously (eg, if they selected

A beneficiaries according to their height or complexion), or corruptly or otherwise in bad faith. If the trustees have acted in good faith then the court will not interfere with their decision.

It was therefore the case that D1 and D2 were given a wide discretion or latitude in the distribution of trust property. They B could have given all the assets to Madam Ratnammal with paltry sums to the rest if they had thought it fit. That would still be in accordance with the Will and Ratnavale's wishes. Their only duty was not to act capriciously but in good faith at all times.

[15] Having held that the trust created in Ratnavale's will is a discretionary C trust, the learned judge went on to determine the status of the deceased beneficiaries. This is how the learned judge put it:

SECOND ISSUE: WHETHER THE PLAINTIFFS HAVE ANY INTEREST OVER THE TRUST PROPERTY

[19] The general rule is that, in a discretionary trust, the objects or the D beneficiaries have no vested or contingent interest over the trust property and the interest of a beneficiary under this type of trust is a mere right to be considered, meaning that the beneficiary in a discretionary trust owns no property until such property is distributed in accordance with the will (see the judgment by Lord Reid in *Gartside & Anor v. Inland Revenue Commissioners* (1968) AC 553). A discretionary trust is of such ambiguous E (but not unascertainable) nature in terms of who should get which property and in what amount.

[20] Nevertheless, beneficiaries in a discretionary trust have an equitable right to call upon the trustees to properly administer the trust property, namely to have the trust property to be distributed as amongst the F beneficiaries in a proper manner. This equitable chose of action extinguishes upon the beneficiary's death. (see *Gartside & Anor v. Inland Revenue Commissioners (supra)* and *Re Gulbenkian's Settlement Trusts (No. 2)* (1970) Ch 408).

[21] In the present case, two of the named beneficiaries, namely G Annalakshmi and Ratnamal have died before the exercise of the trustees' discretion in distributing the trust property upon the testator's death.

[22] I am of the opinion based on the principles enunciated above that the late Annalakshmi and Ratnamal, being beneficiaries under a discretionary trust created by the testator, held no contingent interest over the trust property which was yet to be determined at the time of their H death. No property had been passed down to them during their lifetime and surely after their death. Their rights extinguish upon their death. The equitable rights and interests of another six surviving beneficiaries (the plaintiffs in the present case) are still in existence. What are the surviving beneficiaries' courses of action from here onwards?

I

Our Views

[16] The learned judge in coming to his decision that the rights of deceased beneficiaries under the Ratnavale's will had been extinguished upon their deaths as can be seen from above relied on the cases of *Gartside & Anor v. Inland Revenue Commissioners* [1968] AC553 408 and *Re Gulbenkian's Settlement Trusts (No. 2)* [1970] CH 408 which learned counsel for the appellant submits that the learned judge had misconstrued the rationale of the House of Lords in both the cited cases and hence had erred in his decision. In the circumstance, we now examine the two aforesaid cases in detail.

[17] The factual matrix of the *Gartside* case as per the headnote of the report was this. By his will, made in 1934, the testator gave a fourth share of the residue of his estate to trustees to hold on trust as follows: (1) to apply the income of the fund at their discretion for the maintenance or benefit of all or any of his son, his son's wife or children (if any), and to accumulate surplus income as an addition to capital with power at any time to resort to the accumulations and to apply them as current income, and (2) after the son's death, to hold the capital, income, and accumulations upon trust for such of the son's children as being male attained 21 or being female attained that age or married, and if more than one equally. He gave power to the trustees to advance at any time to a grandchild of his sums of up to one-half of the presumptive or vested share of that grandchild in the fund.

The testator died on 8 January 1941; in 1942 the son married and, in 1945, twin sons were born; there were no other children. On 2 January 1962, the trustees exercised their power of advancement in favour of the testator's grandsons. They declared that they held investments and the income thereof on trust for each grandson should he attain 21 years; the investments formed part of the original capital of the testator's son's share, and represented less than one-quarter of it. The testator's son died in May 1963, and the Crown claimed estate duty on the two funds advanced in 1962. The trustees contested this claim on the grounds that (1) before the power of advancement was exercised in 1962 neither the discretionary objects nor the accumulation beneficiaries had an "interest in possession" or, indeed, any "interest" at all in the trust fund, within the meaning of s. 43 of the Finance Act 1940; and (2) even if there was an interest in possession, it was not of a measurable amount as required by s. 2 (1)(b) and s. 7(7) of the Finance Act, 1894.

[18] Lord Reid had this to say on the nature of the interests which the object of a discretionary trust have (p. 607):

> In my judgment, an examination of the relevant provisions of this legislation leads to the clear conclusion that objects of a discretionary trust do not have interests extending to the whole or any part of the income of the trust fund and it must follow that they do not have interests in the fund within the meaning of s. 2(1)(b). And when one comes to s. 43

A of the 1940 Act, a *fortiori* they do not have interests in possession. It does not seem to me to be a reasonable method of construction to say first that you must disregard technicalities when considering what "interest" means and then, with regard to the rest of the phrase "in possession", introduce the technicality that any interest which is not "in expectancy" must be an interest "in possession". To have an interest in possession B does not merely mean that you possess the interest. You also possess an interest in expectancy, for you may be able to assign it and you can rely on it to prevent the trustees from dissipating the trust fund. "In possession" must mean that your interest enables you to claim now whatever may be the subject of the interest. For instance, if it is the current income from a certain fund your claim may yield nothing if there C is no income, but your claim is a valid claim, and if there is any income you are entitled to get it. But a right to require trustees to consider whether they will pay you something does not enable you to claim anything. If the trustees do decide to pay you something, you do not get it by reason of having the right to have your case considered: you get it only because the trustees have decided to give it to you. Even if I had D thought the objects of discretionary trusts have interests, I would not find any good reason for holding that they have interests in possession.

[19] Lord Wilberforce describes the beneficiary's rights as follows (pp. 617-618):

E No doubt in a certain sense a beneficiary under a discretionary trust has an "interest": the nature of it may, sufficiently for the purpose, be spelt out by saying that he has a right to be considered as a potential recipient of benefit by the trustees and a right to have his interest protected by a court of equity. Certainly that is so, and when it is said that he has a right to have the trustees exercise their discretion "fairly" or "reasonably" or F "properly" that indicates clearly enough that some objective consideration (not stated explicitly in declaring the discretionary trust, but latent in it) must be applied by the trustees and that he has an interest which is capable of being taxed by reference to its extent in the trust fund's income: it may be a right, with some degree of concreteness or solidity, one which attracts the protection of a court of equity, yet it may still lack the G necessary quality of definable extent which must exist before it can be taxed. This may be illustrated by reference to the decision in *Skinner v. Attorney-General* on which the Crown relied. Whatever may be the correct explanation of that case, the existence of the element of extent was clearly apparent. In the present case its absence is equally noticeable, so that merely to show that "interest" in section 2 (1)(b) has a "popular" meaning H _ as Sir Wilfrid Greene M.R. described it in the Court of Appeal: In *re White* - fails to meet the critical difficulty in the Revenue's way.

[20] From our reading of the *Gartside*'s judgments of the Law Lords, we are of the considered view that the only principle to be distilled is that a I beneficiary under a discretionary trust had no immediate right to the trust property and hence in the context of that case, the estate of John Gartside, as held by the Law Lords, had no "interest in possession" as prescribed in

s. 43 of the Finance Act 1940 and thus not liable for estate duty. The only right of a beneficiary of a discretionary trust is to require the trustees to consider from time to time whether or not to apply the whole or some part of the income for his benefit. That is all the Privy Council had decided, nothing more nothing less. At no time was there any ruling or opinion from the Law Lords which stated that the right of the beneficiary of a discretionary trust would be extinguished upon his or her death.

[21] As for the case of *Re Gulbenkian's Settlement Trusts (No. 2) (supra)*, we have read and re-read the judgments of the Privy Council and with respect cannot see any justification for the learned judge to rely on the same to premise his conclusion of that the rights of a beneficiary under a discretionary trust extinguishes upon his or her death. All the Privy Council there was requested (as per the headnotes of the report) to determine the simple and sole issue of whether the provisions contained in (a) a settlement dated 31 May 1929 ("the 1929 settlement"), and made between Calouste Sarkis Gulbenkian ("the settlor"), of the first part, Nubar Sarkis Gulbenkian of the second part and others of the third part, and (b) a settlement dated 18 July 1938 ("the 1938 settlement"), made between the settlor of the one part and others of the other part relating (i) in the case of the 1929 settlement to the payment or application of the income during the life of Nubar Sarkis Gulbenkian of the trust fund thereby settled, and (ii) in the case of the 1938 settlement to the payment or application of the annuity referred to in cl. 6 thereof and (by reference to the 1938 settlement) in a deed of covenant dated 21 June 1945, relating to the annuity referred to in cl. 1 thereof (excepting in each case the provision for refunding to the settlor any moneys not otherwise applied as therein mentioned) were void for uncertainty. The Privy Council in applying the general principle of construction of documents came to conclusion that settlements were not void due uncertainty.

[22] Hence we agree with the submission of counsel for the appellant which states that the statement of the learned judge's statement of "this equitable chose of action extinguishes upon the beneficiary's death" is a complete *non sequitur* unsupported by any authority and plainly wrong.

[23] In our view, the court, in the context of this case, is only required to determine what the intentions of the testator in the Ratnavale's will were and the only way to execute that task is to look first at the will and read it without regard to the consequences of any rule of law or canon of construction. What that simply means is that the words used in the will must be given the meaning which is rendered necessary by the context of the whole will in that a particular passage must be read together with whatever is relevant in the rest of the will to explain it. Where the court finds on the face of the will a clear, general or paramount intention to which effect can be given, and a particular or subordinate intention to which, by reason of some rule of law,

the court cannot wholly or partially give effect, or which is inconsistent with or does not carry out all the intentions which the testator has or is presumed to does not carry out all the intentions which the testator has or is presumed to have, then the particular intention must be rejected or modified, and the general intention of the testator be carried into effect.

[24] To recapitulate, the testator gave all his property, moveable or immovable, to his wife, his mother and his six children but in such proportion as his trustees at their discretion deem fit. Here there is no dispute that the deceased beneficiaries had outlived the testator but had died prior to the exercise of the discretion of the trustees of the Ratnavale's will.

[25] Can we then say in these circumstances, and as decided by the learned judge, that it was the testator's intention to disenfranchise the two deceased beneficiaries upon their deaths? Applying the principles of construction as set out earlier, we see no such intention of disenfranchisement for the simple reason that there was no such specific provisions or words used by the testator in the Ratnavale's will. The courts cannot infer such an intention and any attempt to do so would amount to re-writing the will. We are fully aware that the will had created a discretionary trust but that does not *ipso facto* or automatically infer an intention of disenfranchisement upon the death of any of the beneficiary. In *Chief Commissioner of Stamp Duties v. Buckle* [1998] 151 ALR 1 the learned judge in our view adopted the correct approach when he said:

> In submissions upon the appeal, the term 'discretionary trust' was used as an overall description of the trusts for which the deed of settlement provided. The meaning of this term is disclosed by a consideration of usage rather than doctrine and the usage is descriptive rather than normative. … On the other hand 'discretionary trust' has no fixed meaning and is used to describe particular features of certain express trusts.

[26] In our view, the case of *Sudeley v Attorney* [1897] AC 11 is an applicable authority to the case before us. In that case, the House of Lords dealt with the position of a beneficiary who died during the administration of an estate and in particular the position of her executor. There, the testator had died in 1892 and the wife, who was the only named residual beneficiary under his will, died in 1893 prior to the completion of the administration of her husband's estate. The Law Lords held that the wife's executor had the right to require the husband estate's executors to administer and distribute the residue as part of the estate of the deceased wife. Similarly, here, the representatives of the estate of the wife and mother of the Ratnavale are entitled to demand their "equitable chose of action" to be remitted to their estate so that they can compel the executors to carry out the terms of the trust.

[27] Further, we must not lose sight of the fact that every beneficiary in a discretionary trust has the legal right to challenge the decisions of the trustees if that decision was arrived at in bad faith or illegal even though the testator had given the trustees a full discretion to determine the proportion to be given to the beneficiaries. Generally speaking, such a legal right can only be taken away by clear words and as held by us earlier, we see no such intention to disenfranchise the deceased beneficiaries in the mother and the wife from the estate.

[28] For completeness, we are fully aware that counsel for the appellant had urged the court to make an order that the costs of litigation be recovered from the assets of the estate. Counsel for the respondent had also submitted that the conduct of the appellant as trustee leave a lot to be desired insofar as the administration of the estate of Ratnavale is concerned and hence urged us to take the same into consideration in our deliberation. On both scores, we decline the request for the simple reason that they are not relevant to the issues which we are called to determine and that is to construe the words employed in the Ratnavale's will.

Conclusion

[29] This appeal only requires us to determine the intention of Ratnavale in his will and we did that by interpreting or construing the words used by the testator. And by applying the normal trite principles of construction of document, we had no problem in giving those words their plain and obvious meaning as set out above.

[30] Accordingly, we allow the appeal with no order as to costs and allow prayers 1 and 2 of the notice of counterclaim. We also order that the High Court orders be set aside. Finally, we order that the deposit of this appeal be refunded to the appellant.